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Supreme Court of the United States

October Term, 1975

No. 75-339

BUFFALO FORGE COMPANY, *Petitioner,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO; I. W. ABEL as International President; MITCHEL F. MAZUCA, Ind. and as District Director; JOHN GRUKA, Ind. and as International Representative of United Steelworkers of America, AFL-CIO;
LOCAL UNION No. 1874 of the United Steelworkers of America, AFL-CIO; VALENTINE F. ZIZZI, Ind. and as President; VALENTINE OLEJNICZAK, Ind. and as Vice President of Local Union No. 1874 of the United Steelworkers of America, AFL-CIO;
LOCAL UNION No. 3732 of the United Steelworkers of America, AFL-CIO; KERMIT HASELEY, Ind. and as President; and ALFRED LIGAMMARI, Ind. and as Vice President of Local Union No. 3732 of the United Steelworkers of America, AFL-CIO; *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, [redacted]

J. ALBERT WOLL
ROBERT C. MAYER
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005
LAURENCE S. GOLD
815 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorneys for AFL-CIO

GEORGE H. COHEN
ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036
BERNARD KLEIMAN
CARL FRANKEL
RUDY L. MILASICH, JR.
Five Gateway Center
Pittsburgh, Pennsylvania 15222
THOMAS P. McMAHON
1028 Liberty Bank Building
Buffalo, New York 14202
Attorneys for USWA

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTION PRESENTED 2

COUNTER-STATEMENT OF THE CASE 2

A. The Factual Background 2

B. The Proceedings Below 3

SUMMARY OF ARGUMENT 6

ARGUMENT

Introduction 8

I. *Boys Markets* Established Two Essential Requirements Which Must Be Satisfied Before a Strike Injunction May Issue: (1) The Strike Is in Breach of Contract; (2) The Strike Is Over An Arbitrable Grievance. Neither of These Requirements Can Be Met in This Case. 12

II. Issuance of the Injunction Sought Here Would Require Judicial Repeal of Norris-LaGuardia and Reversal of the Principles of National Labor Policy Expressed in *Boys Markets* ... 22

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Amstar Corp. v. *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,* 468 F.2d 1372 (5th Cir. 1972) 5

Associated General Contr. of Ill. v. *Illinois Conf. of Teamsters,* 454 F.2d 1324 (7th Cir. 1972) 25

Boys Markets, Inc. v. *Clerks Union,* 398 U.S. 235 (1970) .... *passim*

Carpenters Union v. *Labor Board,* 357 U.S. 93 (1958) 29

Construction Workers v. *Curry,* 371 U.S. 542 (1963) 15

Emery Air Freight Corporation v. *Local Union 295,* 449 F.2d 586 (2d Cir. 1971) 4, 27

Gary Hobart Water Corp. v. *NLRB,* 511 F.2d 287 (7th Cir. 1975), cert. denied 44 U.S.L.W. 3263 (Nov. 3, 1975) 16

Page

Gateway Coal Co. v. *United Mine Workers,* 414 U.S. 368 (1974) 13, 17

Hyster Company v. *Independent Towing & Lifting Mach. Ass'n.,* 519 F.2d 89 (7th Cir. 1975) 16

Inland Steel Co. v. *Local Union No. 1545, United Mine Workers of America,* 505 F.2d 293 (7th Cir. 1974) 6, 19

Island Creek Coal Co. v. *United Mine Workers,* 507 F.2d 650 (3rd Cir. 1975), cert. denied 44 U.S.L.W. 3192 (Oct. 6, 1975) 19

Labor Board v. *Denver Building Trades Council,* 341 U.S. 675 (1951) 25

Liner v. *Jafco, Inc.,* 375 U.S. 301 (1964) 15

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. *Lucas Flour Co.,* 369 U.S. 95 (1962) 5, 11, 17

Michigan Nat. Bank v. *Michigan,* 365 U.S. 467 (1961) 29

Montana-Dakota Utilities Co. v. *NLRB,* 455 F.2d 1088 (8th Cir. 1974) 16

NAPA Pittsburgh, Inc. v. *Automotive Chauffeurs, Parts and Garage Employees, Local Union No. 926,* 502 F.2d 321 (3rd Cir. 1974) (*en banc*), cert. denied 419 U.S. 1049 (1974) 5, 14, 15, 19-22

Red Lion Broadcasting Co. v. *F.C.C.,* 395 U.S. 367 (1969) 29

Sinclair Refining Co. v. *Atkinson,* 370 U.S. 195 (1962) ..... *passim*

Steelworkers v. *American Mfg. Co.,* 363 U.S. 564 (1960) 11, 17

Steelworkers v. *Enterprise Corp.,* 363 U.S. 593 (1960) ... 11, 16, 17

Steelworkers v. *Warrior & Gulf Co.,* 363 U.S. 524 (1960). 11, 12, 17

Stockdale v. *Atlantic Ins. Co.,* 20 Wall. 323 (1874) 29

Teamsters v. *Yellow Transit,* 370 U.S. 711 (1972) 7, 9, 24

Textile Workers v. *Lincoln Mills,* 353 U.S. 448 (1957) 8, 11

United States v. *Freeman,* 3 How. 564 (1845) 29

United States v. *Price,* 361 U.S. 304 (1960) 30

United States v. *United Mine Workers,* 330 U.S. 258 (1947) 30

United States Steel Corp. v. *United Mine Workers,* 519 F.2d 1236 (1975) 19

Waterman S.S. Corp. v. *United States,* 381 U.S. 252 (1965) 30

Page

Statutes

Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. §151 *et seq.*):
Section 8(b)(4)(B) 25
Section 208(b) 8
Section 301 ..... *passim*
Section 302 23

National Labor Relations Act as amended (61 Stat. 149, 29 U.S.C. §151 *et seq.*):
Section 10(h) 8

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §101 *et seq.*):
Section 4 ..... *passim*

Congressional Materials

75 Cong. Rec. 4929 (1932) 14
75 Cong. Rec. 4935 (1932) 14
75 Cong. Rec. 5489 (1932) 14
93 Cong. Rec. 6445-6446 (1947) 9
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 9
H.R. 5900, 94th Cong., 1st Sess. 25, 26, 27
S. 1479, 94th Cong., 1st Sess. 25, 26, 27, 28
S. Conf. Rep. No. 94-518, 94th Cong., 1st Sess. 27, 28
S. Rep. No. 94-438, 94th Cong., 1st Sess. 26
11 Weekly Compilations of Presidential Documents 1393 (1975).. 28
12 Weekly Compilations of Presidential Documents 16-17 (1976).. 28

Miscellaneous

Corbin, Contracts (Vol. 1, 1960) 17
Dunau, *Three Problems in Labor Arbitration,* 55 Va. L. Rev. 427 (1967) 15
Frankfurter and Greene, The Labor Injunction (1930) 14, 15
Williston, Contracts (3rd ed. 1957) 17
Note, 71 Colum. L. Rev. 336 (1971) 22
Note, 88 Harv. L. Rev. 463 (1974) 15, 22
Comment, *Boys Markets Developments in the Third Circuit,* 48 Temple L. Q. 281 (1975) 22

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BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INLUSTRIAL ORGANIZATIONS, As AMICUS CURIAE*

* The parties have consented in writing to the filing of a brief *amicus curiae* by the AFL-CIO. The AFL-CIO and the United Steelworkers of America have filed a motion for leave to file a joint brief.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the courts below were correct in holding that Norris-LaGuardia precludes injunction of a peaceful strike where the *Boys Markets* requirements that the strike be in breach of contract and over an arbitrable grievance are not met.

COUNTER-STATEMENT OF THE CASE

A. The Factual Background

For many years the United Steelworkers of America, AFL-CIO ("the Union") has represented the production and maintenance (P&M) employees at three of the Buffalo Forge Company's ("the Company") facilities in the Buffalo, New York area under a series of successive contracts (P. 12a).[1] Shortly before the events described herein, the Union was also certified as the exclusive bargaining representative for new bargaining units consisting of the Company's previously unorganized office, clerical and technical (O&T) employees. These O&T workers were employed at the same three locations mentioned above (P. 12a).

The O&T employees had been engaged for months in an effort to negotiate a first collective bargaining agreement with the Company. On November 16, 1974, the O&T employees struck in support of their bargaining demands. Picket lines were established at the Company's production and office facilities (P. 12a). This strike and the accompanying picket line are conceded by the petitioner to be "*bona fide,* primary and legal" (Pet. Br. pp. 3-4).

At that time collective bargaining agreements were in effect covering the P&M employees which contained, *inter alia:* (1) a mandatory procedure for the submission to arbitration by either party of any grievance dispute involving "a question as to the meaning and application of the provisions of th[e] Agreement . . . " (Section 32) (A. 19); and (2) a no strike clause (Section 14(b)), providing in relevant part that "[t]here shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity" (A. 16).

[1] All references to the Appendix shall be designated "A"; the opinions of the courts below are printed as appendices to the Petition For a Writ of Certiorari, and references thereto shall be designated "P".

In the latter part of November 1974, the Union authorized the P&M employees to honor the picket lines of the O&T employees. As a result, a collective refusal to work by the P&M employees—[2] a so-called "sympathy strike"—occurred at each of the Company's three facilities for varying time periods (P. 12a-13a).

B. The Proceedings Below

The Employer responded to this concerted activity by filing the instant §301 suit[3] seeking damages and an injunction against the work stoppage resulting from this refusal to cross the picket line. In the district court, the Company made alternative arguments (see Complaint at A. 7) in an effort to meet the preconditions established by *Boys Markets, Inc.* v. *Clerks Union,* 398 U.S. 235 (1970), for entitlement to an injunction against the work stoppage by the P&M employees: (1) that the work stoppage was caused by a specific in-

[2] The district court noted that "[c]ertain members of the defendant Locals have crossed the picket lines and gone to work" (P. 16a).

[3] Section 301(a), Labor-Management Relations Act, 61 Stat. 136, 156, 29 U.S.C. §185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

cident on November 18, 1974, which the Company considered to create an "arbitrable" grievance—a supervisor's ordering a truck driver within the P&M unit to drive a non-Company owned vehicle across the O&T picket line (P. 13a-14a); and (2) that the legality of the work stoppage itself was arbitrable.

The court expressly found that the "evidence support[ed] the [Unions'] position" (P. 16a) that the work stoppage did not take place in protest over the November 18 incident (P. 13a-16a), but rather as a direct consequence of the P&M employees' sympathy action supporting the O&T employees' strike for a new agreement. Having so found, the district court determined that the Norris-LaGuardia Act, 47 Stat. 70, 70-71, 29 U.S.C. §104, forbids the issuance of an injunction because the Company had not established that the case comes within the "narrow" exception to that Act established in *Boys Markets:*

> "The *Boys Markets* standards do not apply to this case because there is no arbitrable grievance between the parties" (P. 18a).

On appeal, the district court's findings of fact were not challenged (P. 8a, n. 7). The Court of Appeals affirmed, stating in pertinent part (P. 7a-9a):

> "In assessing the extent to which §301(a) modified the anti-injunction policy of Norris-LaGuardia, we base the tenor of our inquiry on the Court's emphasis in *Boys Markets* on the narrowness of its holding in favor of injunctive relief. *Id.* 398 U.S. at 253, 90 S.Ct. 1583. *Compare* Emery Air Freight Corp. v. Local Union 295, 449 F.2d 586, 588 (2d Cir. 1971). In narrowly construing the exception to §4 of the Norris-LaGuardia Act carved out by §301(a) in the view of the *Boys Markets* Court, then, we take particular note of the various indications in *Boys Markets* and in the *Sinclair Refining* dissent upon which the latter drew that only strikes

over a grievance which the union has agreed to arbitrate are within the scope of the exception. *See, e.g., Boys Markets, supra,* 398 U.S. 235 at 248, 254, 90 S.Ct. 1583; *Sinclair Refining, supra,* 370 U.S. 195 at 217-18, 224-25, 228, 82 S.Ct. 1328. The strike at issue in the instant case is not over a grievance with Buffalo Forge but instead is simply a manifestation of the striking workers' deference to other employees' picket lines.

"This distinction is crucial in light of the need, recognized in *Boys Markets* and the *Sinclair Refining* dissent, to reconcile the anti-injunction policy of Norris-LaGuardia with the pro-arbitration policy of the later act. If a strike not seeking redress of any grievance is enjoinable, then the policy of Norris-LaGuardia is virtually obliterated. For since a no-strike provision, if not in fact present in the employment contract, will be implied where the agreement sets up mandatory arbitration machinery, Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 104-06, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962), it is, as the Fifth Circuit has concluded, 'difficult to conceive of any strike which could not be so enjoined.' Amstar Corp. v. Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO, 468 F.2d 1372, 1373 (5th Cir. 1972). Undue expansion of the 'narrow' holding in *Boys Markets* may be avoided, on the other hand, by proper attention to the actual threat posed by strikes not over grievances with the employer to the policies promoted by §301(a). A strike not seeking to pressure the employer to yield on a disputed issue is not an attempt to circumvent arbitration machinery established by the collective bargaining agreement. Accordingly, it does no violence to the federal pro-arbitration policy to require federal courts to refrain from enjoining such strikes. *See* Napa Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage

Employees, Local Union No. 926, 502 F.2d 321, 330-31 (3d Cir. 1974) (en banc) (Hunter, J. & Seitz, C. J., dissenting), cert. denied, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974); Inland Steel Co. v. Local Union No. 1545, United Mine Workers of America, 505 F.2d 293, 300-01 (7th Cir. 1974) (Fairfield, J., dissenting).

"Since the work stoppage under review is motivated solely by respect for other employees' picket lines and plainly is not aimed at resolving an existing dispute by extra-arbitral means, the district court's order denying a preliminary injunction gave effect to §4 of the Norris-LaGuardia Act without disservice to the policies informing §301(a) of the Labor Management Relations Act. Chief Judge Curtin's application of the two provisions to the context before him comported with the Supreme Court's direction to district courts in its *Boys Markets* opinion to reconcile the two provisions rather than simplistically read a repeal of §4 into the later enactment." (Footnote omitted; emphasis in original.)

SUMMARY OF ARGUMENT

The Norris-LaGuardia Act prohibits federal courts from issuing injunctions against peaceful strikes. In *Boys Markets, Inc.* v. *Clerks Union,* 398 U.S. 235, 253 (1970), this Court, taking care "not [to] undermine the vitality of the Norris-LaGuardia Act," defined a "narrow" area where an injunction against a strike does not detract from the core purpose of Norris-LaGuardia *and* is necessary to vindicate the national labor policy favoring the voluntary settlement of labor disputes by arbitration. Only within this narrow area does *Boys Markets* permit an injunction against a strike. The injunction sought here would violate Norris-LaGuardia without furthering the arbitration process. In place of the "accommodation" between the prohibition against enjoining peaceful strikes and the policy favoring arbitration, petitioner seeks judicial repeal of Norris-LaGuardia whenever it is alleged that a strike is in breach of contract.

In Part I of this brief, we show that issuance of the injunction sought here cannot be justified under the holding and rationale of *Boys Markets.* There, this Court established two prerequisites to the exercise by federal courts of the limited power to enjoin peaceful strikes. Before a *Boys Markets* injunction may issue, a district court must find (1) that the strike is in breach of the collective bargaining agreement, and (2) that the strike is over a grievance which the parties are contractually bound to arbitrate. Neither of these prerequisites—designed to restrict the exercise of such power to circumstances where an injunction does not undermine the core values of Norris-LaGuardia *and* is necessary to vindicate the arbitration process agreed upon by the parties—is met here.

In Part II, we show that to grant the injunction here would constitute a reversal, not an extension, of *Boys Markets.* Petitioner's position reduces to a claim that injunctive relief should be available to enforce a union's contractual commitment not to strike, regardless of whether such relief would further the arbitration process. This very claim was rejected in the dissenting opinion in *Sinclair* v. *Atkinson,* 370 U.S. 195, 215 *et seq.* (1962), which opinion was adopted by the Court in *Boys Markets:*[4]

> ". . . [T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail. * * *"

370 U.S., at 225. See also, *Teamsters* v. *Yellow Transit,* 370 U.S. 711 (1962). Thus, *Boys Markets* established the metes

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[4] 398 U.S., at 249.

and bounds of the judicial power to issue injunctions against peaceful strikes. Those metes and bounds were approved by both the Senate and House of Representatives in 1975 during the progress of the common-situs picketing bill through Congress.

ARGUMENT

Introduction

In §4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §104, Congress declared that, in any case "involving or growing out of any labor dispute," federal courts were prohibited from enjoining, *inter alia,* peaceful strikes. Congress' purpose was to put an end to the hasty and usually decisive issuance of injunctions and restraining orders by federal courts which tipped the scales in non-violent labor disputes.

In 1947, Congress enacted §301(a) of Taft-Hartley which authorized federal courts to entertain suits to enforce collective bargaining agreements. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957). In so doing, Congress did not repeal the Norris-LaGuardia Act's prohibition of injunctions against strikes in violation of collective bargaining agreements. In fact, Congress considered and rejected a proposal which would have accomplished that precise result.[5] The House of Representatives had originally proposed a bill conferring jurisdiction upon federal courts to enforce collective bargaining agreements and, in addition, specifically repealing in such suits the Norris-LaGuardia ban on injunctions. The portion of the bill conferring jurisdiction sur-

[5] At the same time, Congress did repeal Norris-LaGuardia in limited respects not applicable here. Thus, federal courts were authorized to enjoin certain types of strikes which Taft-Hartley made illegal, *e.g.,* secondary boycotts and national emergency strikes. See, §10(h) of the National Labor Relations Act, 61 Stat. 146, 155, as amended, 29 U.S.C. §160(h); §208(b) of the Taft-Hartley Act, 61 Stat. 144, 29 U.S.C. §178(b).

vived the conference and became §301(a) of the Taft-Hartley Act; the repeal provision was expressly rejected in conference and did not become law. See particularly, the House Conference Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 66, I Legislative History of the Labor-Management Relations Act of 1947 (hereafter Leg. Hist.). As Senator Taft, Chairman of the Senate conferees, explained, "the conferees * * * rejected the repeal of the Norris-LaGuardia Act." 93 Cong. Rec. 6445-6446, II Leg. Hist. 1544.

On the basis of this legislative history of §301(a), both the majority and dissenting opinions in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), recognized that the Norris-LaGuardia ban on injunctions against strikes in breach of contract remains in force. The *Sinclair* majority held that the Congressional decision foreclosed injunctions against strikes in any suit brought under §301 of the Act. Three justices, however, drew a more specific lesson from this history. They agreed that the Norris-LaGuardia Act is controlling where the policy of enforcing a contractual no-strike obligation stands alone:

> "[T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail."

Id. at 225. On this basis they joined in the result in *Teamsters* v. *Yellow Transit,* 370 U.S. 711 (1962), argued before *Sinclair* but decided a week after, where the Court unanimously reversed the grant of an injunction against a strike which was in breach of contract, but which was not over an issue that could be resolved by arbitration.

However, the minority in *Sinclair* urged,

> "that rejection of an outright repeal of §4 was wholly

consistent with acceptance of a technique of accommodation which would lead, in some cases, to the granting of injunctions against concerted activity. Accommodation requires only that the anti-injunction policy of Norris-LaGuardia not intrude into areas, not vital to its ends, where injunctive relief is vital to a purpose of §301; it does not require unconditional surrender."

Id. at 225. In their view, injunctions were not

"barred against strikes over grievances which have been routed to arbitration by a contract specifically enforceable against both the union and the employer. Enforced adherence to such arbitration commitments has emerged as a dominant motif in the developing federal law of collective bargaining agreements."

Id. at 224-225. They concluded that a strike in breach of contract may be enjoined where it is "over a grievance which both parties are contractually bound to arbitrate." *Id.*

The views of the *Sinclair* dissenters became those of the Court in *Boys Markets, Inc.* v. *Clerks Union*, 398 U.S. 235 (1970). The *Boys Markets*' Court held "that the dissenting opinion in *Sinclair* states the correct principles concerning the accommodation necessary between the seemingly absolute terms of the Norris-LaGuardia Act and the policy considerations underlying §301(a)." *Id.* at 249. The *Boys Markets*' Court adopted the standards set out in the *Sinclair* dissent *in haec verba:*

"A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance."

Id. at 254.

The policy considerations requiring this accommodation had been elaborated,

"in such cases as *Lincoln Mills,* the *Steelworkers Trilogy,* and *Lucas Flour,* [which emphasized] the importance that Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end." (*Id.* at 252)

Given the central role of arbitration, *Sinclair* was overruled, because its holding

"undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices." (*Id.* at 252)

This undermining effect is shown by the facts in *Boys Markets* itself. That case arose when the union struck to force the employer to capitulate to the union's view that the collective agreement in force prohibited the company from assigning non-unit personnel to perform certain bargaining unit work, even though the contract provided that such disputes "shall be settled and resolved" by arbitration. *Id.* at 238-239, n. 3. When a union, which has agreed to arbitrate a contract grievance, strikes to force the employer

to resolve the grievance in its favor, the union is undermining the very purpose of the arbitration provision: to serve as a "substitute for industrial strife" (*Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 524, 528). For in that circumstance, if the strike is successful, the grievance will be resolved by economic pressure and not by the reasoned decision of an arbitrator for which the parties had bargained.

I. *BOYS MARKETS* ESTABLISHED TWO ESSENTIAL REQUIREMENTS WHICH MUST BE SATISFIED BEFORE A STRIKE INJUNCTION MAY ISSUE: (1) THE STRIKE IS IN BREACH OF CONTRACT; (2) THE STRIKE IS OVER AN ARBITRABLE GRIEVANCE. NEITHER OF THESE REQUIREMENTS CAN BE MET IN THIS CASE.

To insure that the exercise of the power to enjoin peaceful strikes would not exceed the justification for the intrusion upon interests protected by the Norris-LaGuardia Act, *Boys Markets* establishes two threshold requirements: (1) that the strike *is* in breach of the collective bargaining agreement, and (2) that the strike is "over" an arbitrable grievance. As we show in this section of the brief, neither of these requirements is met here. That is why the lower courts were correct in refusing to enjoin the strike. For, while the Company finds the defect of the Second Circuit's decision to be the "adopt[ion]" of a "literal reading" of *Boys Markets* (Pet. Br. 16, 17-18), the "literal" requirements of *Boys Markets* are the expression of the accommodation between Norris-LaGuardia and §301 reached by this Court.

1. This Court's opinion in *Boys Markets* was grounded on the district court's determination in that case "that the strike was in violation of the contract." 398 U.S., at 240. From the very first sentence, where the issue is presented, and throughout the opinion, the Court's analysis was premised on the district court's determination that the strike in question was in breach of contract. See e.g., 398 U.S., at 237, 243, 245, 251-52, 252-53, 254. The dissenting opinion

in *Sinclair*, which the Court adopted in *Boys Markets*, 398 U.S., at 249, similarly stated that the "principle of accommodation" there enunciated applies to strikes which are "breaches of contract." 370 U.S., at 228. And, in *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 380 (1974), this Court reaffirmed that a strike—even when over an arbitrable grievance—must be found in breach of contract before it can be enjoined under the doctrine of *Boys Markets:*

> "The second question is whether the District Court had authority to enjoin the work stoppage. The answer depends on whether the union was under a contractual duty not to strike."

The fact that the strike in *Boys Markets* was in breach of contract was not merely incidental to the Court's holding; it was a necessary element of the Court's analysis. The *Boys Markets* Court was able to characterize its holding as a "narrow one" which did "not undermine the vitality of the Norris-LaGuardia Act" for the very reason that only injunctions of strikes in breach of contract were contemplated. 398 U.S., at 240, 253-254. Nothing is more clear than that a grant of authority to federal courts to enjoin strikes which may be legal would cut deeply into the protection of that Act.

In contrast to *Boys Markets*, in this case there has been no determination by the lower courts that the strike is in breach of contract. And, in this Court, the Company's prayer for relief (Pet. Br. 22) seeks an injunction pending a determination of that very question by an arbitrator:

> "[T]he judgment of the Court of Appeals for the Second Circuit should be reversed with instructions to direct arbitration of the issue of whether the Unions' conduct violated the terms of the collective bargaining agreement and to enjoin any resumption of the sympathy strike and work stoppage *pending* arbitration." (Emphasis added.)

This prayer for relief reflects a misconception, shared by the Third Circuit, that an injunction pending arbitration of the legality of a strike "does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision." *NAPA Pittsburgh, Inc.* v. *Chauffeurs, Local 926,* 502 F.2d 321, 324 (3rd Cir. 1974) (en banc), cert. denied 419 U.S. 1049 (1974).

An important premise of the Norris-LaGuardia Act is the recognition that the *timing* of a strike is critical to its success. The harm done by the improvident grant of a preliminary injunction against a lawful strike cannot be cured by an ultimate determination that the strike is lawful. As Senator Norris said:

> "The harm of an injunction ninety-nine times out of one hundred is done and the injustice completed within a few days after the restraining order is issued. . . .
>
> The only way to correct such an order is to take an appeal. But by the time such an appeal goes to the Supreme Court of the United States in most cases the backbones of the laboring men have been broken. . . . The damage has been done and the evil has occurred." 75 Cong. Rec. 4929 (1932).

See also, 75 Cong. Rec. 4935 (1932) (Remarks of Senator Bratton); 75 Cong. Rec. 5489 (1932) (Remarks of Rep. Celler). And, in their critique of the judicial practice which the Norris-LaGuardia Act was adopted to halt, Frankfurter and Greene stated:

> "The injunction [does] not preserve the so-called status quo. . . . The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike. . . . Moreover, the suspension of strike activities, *even temporarily,* may defeat the strike for practical purposes and foreclose its resumption, even if the injunction is later lifted." (*The Labor Injunction,* at p. 201 (1930)) (Emphasis added).

This characteristic of the temporary injunction has been well understood by this Court:

> "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board."

Construction Laborers v. *Curry,* 371 U.S. 542, 550 (1963), quoted with approval in *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 308 (1964).

Time is particularly of the essence in a case like the present one where the work stoppage sought to be enjoined is in aid of a concededly lawful strike of other employees for a new agreement. The practical effect of such an injunction is to deny those other employees, who have already committed themselves to the strike, the "mutual aid" protected by Norris-LaGuardia. As one commentator has stated,

> "Refusals to cross picket lines are highly dependent upon timing. Even if the arbitrator ultimately decides that the union has the right to honor the picket line in question, events which occurred while arbitration was going forward could inhibit the effectiveness of any post-arbitration work stoppage. *See* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 329 (3d Cir. 1974) (Hunter, J., dissenting), *petition for cert. filed,* 43 U.S.L.W. 3240 (U.S. Oct. 15, 1974) (No. 74-419); Dunau, *supra* note 26, [55 Va.L. Rev. 427] at 467."

Note, 88 Harv.L.Rev. 463, 467 at n. 29 (1974).

Thus, to grant an injunction pending a determination by the arbitrator as to the validity of the strike is to "under-

mine the vitality of the Norris-LaGuardia Act." Yet, the only alternative would be for the district court to make that determination itself before issuing an injunction. But, such a district court determination disserves the national labor policy favoring the arbitration of contract disputes: "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for." *Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593, 599 (1960). For this reason, the Court has "cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets,* 398 U.S., at 243.[6]

The Company's position, then, leads either to the invasion of the central purpose of §4 of the Norris-LaGuardia Act or to the violation of the very policy favoring arbitration which the Company invokes.

2. The dissenting opinion in *Sinclair,* which was adopted by the Court in *Boys Markets,* 398 U.S. at 249, made clear

[6] It is to be noted that there is no obvious answer to the question whether a sympathy strike such as the one in this case is in breach of contract. The answer (as shown by the cases cited at the end of this note) turns on whether the particular no strike clause at issue constitutes a clear and unmistakable waiver of the right to engage in a sympathy strike. Some agreements expressly include sympathy strikes within the coverage of a union's contractual no strike commitment; at the other extreme, some agreements expressly provide that employees who honor a lawful primary picket line at their place of employment are not engaged in a breach of the no strike clause. The language of the instant no strike clause, as is true of most agreements, fits into neither of the foregoing categories. The no strike clause here does not by its terms expressly cover or exclude a sympathy strike. On contract language similar to that here, whether a no strike clause covers a sympathy strike has been found in other cases to be a very close question, the result often turning on nuances of bargaining history. See, e.g., *Gary Hobart Water Corp.* v. *NLRB,* 511 F.2d 287, 288-289 (7th Cir. 1975), cert. denied 44 U.S.L.W. 3263 (Nov. 3, 1975); *Montana-Dakota Utilities Co.* v. *NLRB,* 455 F.2d 1088, 1098 (8th Cir. 1974); see also, *Hyster Company* v. *Independent Towing & Lifting Mach. Ass'n.,* 519 F.2d 89 (7th Cir. 1975).

that even where a strike is in breach of contract, that alone is not sufficient, consistent with Norris-LaGuardia, to justify enjoining the strike:

> ". . . [T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail."

370 U.S. at 225.

The additional public policy threatened in the *Boys Markets* situation was that favoring arbitration as a "substitute for industrial strife." *Warrior & Gulf, supra,* 363 U.S. at 578, reaffirmed in *Gateway, supra,* 414 U.S., at 378.[7] It was to vindicate that policy that the Court permitted an injunction when a strike is "over" a grievance which the parties are contractually bound to arbitrate.

In its brief, the Company suggests that the distinction is merely semantic between a case where the strike is "over"

[7] The Chamber of Commerce in its *amicus* brief asserts that *Gateway* "implicitly recognized * * * that all coercive economic action during the term of the Agreement is presumptively enjoinable unless an express and clear exception permitting such activity is explicitly included in the collective bargaining agreement" (C. of C. Br. 4). The Chamber misreads *Gateway.* That case extended prior law only in two ways: (1) it held, contrary to the Third Circuit, that the *Steelworkers Trilogy* presumption of arbitrability is applicable to safety disputes; and (2) that *Boys Markets* applies to no strike obligations implied under *Teamsters Union* v. *Lucas Flour,* 369 U.S. 95 (1962), just as to express no strike obligations. This refusal to distinguish between the legal consequences of express and implied obligations accords with well established principles of contract law.

> "Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent."

Restatement of Contracts, §5, Comment a. See also Williston, Contracts, §3, pp. 8-9 (3d ed. 1957); 1 Corbin, Contracts §18, pp. 39-42 (1960).

an arbitrable dispute and one where the legality of the strike is itself the only arbitrable dispute: "Although *Boys Markets* literally involves a strike over an arbitrable grievance, the policy reasons favoring the availability of injunctive relief are equally compelling in this case" (Pet. Br. 8). On the contrary, the letter of *Boys Markets* is in precise conformity with its spirit, because the "over a grievance . . ." requirement separates strikes which undermine the arbitration process from those which do not.

When a strike is "over," or caused by, an arbitrable dispute, the strike is necessarily in derogation of the arbitration mechanism. The very purpose of such a strike is to force the employer to concede on an issue which the parties agreed to have resolved by an arbitrator. If the strike is successful, the underlying dispute will be determined by economic force, the method given up in the contract in exchange for arbitration, and the jurisdiction of the arbitrator will be defeated. For example, instead of permitting an arbitrator to decide whether certain work was improperly assigned to non-unit employees, a strike "over" that work assignment is meant to force the employer to capitulate and to reassign the work regardless of the merit of the case, without resort to arbitration.

But, where, as here,[8] there is no other arbitrable dispute, the fact that the legality of a strike may itself constitute an arbitrable issues does not render the strike's continuation a threat to the arbitration process. The union is not attempting to evade its contractual obligation by using economic force to win an arbitrable dispute. The fact that the employees have honored the primary picket line does not undermine the power of an arbitrator to rule that they thereby acted in breach of contract.

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[8] The district court found: " . . . [T]he work stoppage under review is motivated solely by respect for other employees' picket lines and plainly is not aimed at resolving an existing dispute by extra-arbitral means" (P. 8a-9a) (footnote omitted).

In this respect, a strike is like any other arbitrable dispute. The arbitration process has not been understood to require maintenance of the *status quo* pending the arbitrator's decision. To vary the example cited above, where the parties have agreed to arbitrate disputed work assignments, as in *Boys Markets,* the arbitration process is not undermined, even though the employer's assignment occurs prior to submission of the issue to the arbitrator. Neither the work assignment in *Boys Markets* nor the strike here ousts the arbitrator of jurisdiction to determine the merits of the issue that is arbitrable. Thus, this Court did not in *Boys Markets* issue an injunction requiring the Company to cease utilizing non-bargaining unit personnel pending arbitration of the legality of the Company's assignment.

In short, where the strike is not "over" an arbitrable issue,

> ". . . the policy considerations that provide the *raison d'etre* for the *Boys Markets* decision are totally absent. Stated simply . . . the policy that favors the arbitration of labor disputes will in no way be undermined if the injunction requested here is denied."

NAPA Pittsburgh, Inc. v. *Automotive Chauffeurs, supra,* 502 F.2d, at 326 (Hunter and Seitz, J.J., dissenting).

The reasoning by which Judges Hunter and Seitz reached that conclusion has been expressly adopted by the Second Circuit in this case (Pet. 8a), by the Fifth Circuit in *United States Steel Corp.* v. *United Mine Workers,* 519 F.2d 1236, at 1244, 1248 (1975), by Judge Fairchild dissenting in *Inland Steel Co.* v. *United Mine Workers,* 505 F.2d 293, 301 (7th 1974), and by Judge Adams dissenting both in *NAPA Pittsburgh, supra* and *Island Creek Coal Co.* v. *United Mine Workers,* 507 F.2d 650, 654 (3rd Cir. 1975), cert. denied 44 U.S.L.W. 3192 (Oct. 6, 1975). Because we believe that reasoning to be persuasive, we quote it extensively:

> "*Boys Markets* involved a dispute between an employer and union over the right of union employees to

perform certain tasks at the employer's store. This was a dispute that the Union, in its collective bargaining agreement, had agreed to resolve through the presentation of reasoned arguments to a neutral arbitrator, rather than through the use of economic force, i.e., by means of a strike. However, in that case, the union ignored both its no strike pledge and its agreement to arbitrate the issue and struck for the avowed purpose of forcing a favorable resolution to the arbitrable dispute. Thus, the union's actions made it clear that they did not intend to return to work until the Company conceded that the tasks involved had to be performed by union men.

"Clearly this strike had the effect of undermining the rule of law that favors the arbitration of labor disputes, since the strike was an attempt to force a union victory on the very issue that was made arbitrable not through the presentation of reasoned arguments to a neutral arbitrator, but rather through the use of sheer economic force. If the tactic had been successful, it would have settled the arbitrable dispute, making arbitration superfluous and thereby defeating the arbitrator's jurisdiction. Thus, the strike represented a plain attempt by the union to undermine and avoid its agreement to arbitrate the issue in dispute and the legal policy that favors the arbitration of labor disputes cut clearly in favor of having the district court issue an injunction to end the work stoppage.

* * * *

"In the present case, no similar situation exists. It is true that here, as in *Boys Markets,* there is a dispute that is clearly arbitrable—that is, the dispute over the nature of the Local 110 picket line and hence the legality of the Local 926 work stoppage. However, in this case, unlike *Boys Markets, the union's work stoppage is not designed to force settlement of this arbitrable issue be-*

fore arbitration can take place; it is not an attempt to defeat the arbitrator's jurisdiction.

". . . Local 926 engaged in its work stoppage only because of the presence of Local 110's picket line. The work stoppage was not begun, nor was it continued, because of the union's disagreement with the Company over the arbitrable issue; that is, over its right to engage in a work stoppage. As a result, no concession that the Company could have made on this issue would have helped to end the walkout. That goal could be attained by the Company only if it resolved its dispute with Local 110 and thus caused that union to remove its picket line.

* * * *

"As a result, while in *Boys Markets* the strike deterred the employer from pursuing arbitration, thus making it necessary to enjoin the strike in order to promote the policy favoring arbitration, no similar situation exists here. In this case, since the work stoppage does not pressure the Company to forego arbitration, the issuance of a *Boys Markets* injunction will do nothing to promote the arbitration of labor disputes and its issuance cannot be supported by the policy considerations that underlie *Boys Markets.*

* * * *

"As we stated at the outset, our disagreement with the majority boils down to a dispute as to the meaning of *Boys Markets.* In our opinion, the holding in that case permits the issuance of injunctions to end work stoppages only when an arbitrable dispute is an underlying cause of the strike.

"We reach this conclusion, in part, because of the language used to state the holding in that case. However, we are primarily persuaded by our understanding of the policy considerations that underlie that decision.

In *Boys Markets* the court was faced with a dilemma. On the one hand, it was obliged to give effect to the policy judgment that is embodied in the anti-injunction provisions of the Norris-LaGuardia Act by refusing to issue an injunction. On the other, it was equally obliged to enjoin the strike since its clear effect was to undercut the policy that favors the promotion of arbitration of labor disputes. Under these special circumstances, it ruled that an injunction could issue.

> "It is important to note that the Court's goal was not to end the strike. Instead, its sole purpose was to promote the arbitration of the labor dispute involved by eliminating a serious impediment to that goal. Thus, its rule sensibly permits the enjoining of strikes only when they have the effect of interfering with agreed upon arbitration. As we have noted, a strike can have this effect only when it is caused by the dispute that is supposed to be arbitrated, since only under those circumstances will the strike pressure the employer to capitulate on the arbitrable dispute and therfore forego its arbitration."

502 F.2d, at 325, 326-327, 333 (emphasis in original; footnotes omitted). See also, 88 Harv. L. Rev., *supra,* at 466; Comment, *Boys Markets Developments In The Third Circuit,* 48 Temple L.Q. 281, 308-309 (1975); Note, 71 Colum. L. Rev. 336, 342-344 (1971).

II. ISSUANCE OF THE INJUNCTION SOUGHT HERE WOULD REQUIRE JUDICIAL REPEAL OF NORRIS-LAGUARDIA AND REVERSAL OF THE PRINCIPLES OF NATIONAL LABOR POLICY EXPRESSED IN *BOYS MARKETS.*

A. As we have shown, the injunction sought here does not meet the requirements nor fall within the rationale of *Boys Markets.* Petitioner makes fleeting suggestion, expanded upon by at least two of the *amici curiae,* that this Court should go beyond *Boys Markets* and grant federal courts the

power to enjoin any strike in breach of contract, regardless of whether such an injunction would further the arbitration process. See, Brief of the National Association of Manufacturers (hereinafter "NAM Br.") 3; Brief of Chamber of Commerce of the United States 3-4. The NAM denies that this result would require

> "reversing the rule stated in *Boys Markets.* . . . Rather the Court merely will be continuing the process of accommodating Section 4 of the Norris-LaGuardia Act to Section 301(a) of the Labor Management Relations Act ('LMRA') in light of the realities of modern labor-management relations."

NAM Br. 4. On the contrary, acceptance of that argument would constitute a reversal, not an extension, of *Boys Markets.*

As discussed above, pp. 8-9, Congress in enacting §301(a) expressly rejected a proposal which would have repealed the Norris-LaGuardia Act's prohibition of injunctions against strikes in violation of collective bargaining agreements.[9] The *Sinclair* dissent recognized the force of this Congressional determination and concluded that Norris-LaGuardia does not permit a strike injunction to issue solely on the basis that the strike is in breach of contract:

> " . . . [T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private con-

[9] The NAM in its Brief at 6 misrepresents that certain remarks—relating to the availability of equitable relief—made by Congressmen Barden concerning §302(e) of the House Bill are equally applicable to §301(a). To support that conclusion, the NAM states that §302 of the House Bill was "identical in all major respects to Section 301(a)." *Id.* In fact, the proposed §302(e) would have made Norris-LaGuardia inapplicable to suits for breach of contract. However, this portion of the House Bill was rejected in conference (see pp. 8-9, *supra*). Indeed, it was by eliminating §302(e) of the House Bill that Congress made clear that Norris-LaGuardia would not be repealed in suits under §301.

tracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail. Insistence upon strict application of Norris-LaGuardia to a strike over a dispute which both parties are bound by contract to arbitrate threatens a leading policy of our labor relations law. But there may be no such threat if the union has made no binding agreement to arbitrate; and if the employer cannot be compelled to arbitrate, restraining the strike would cut deep into the core of Norris-LaGuardia. . . . Accommodation requires only that the anti-injunction policy of Norris-LaGuardia not intrude into areas not vital to its ends, where injunctive relief is vital to a purpose of §301; it does not require unconditional surrender."

370 U.S. at 225.

Just one week after *Sinclair,* a unanimous Court, including the *Sinclair* dissenters, held that a strike in breach of contract could not be enjoined in a case where the parties were not bound to arbitrate any dispute. *Teamsters* v. *Yellow Transit,* 370 U.S. 711 (1962) (more complete recitation of facts at 282 F.2d 345). *Cf.* NAM Br. 3. And, of course, the *Sinclair* dissent was subsequently adopted by the Court in *Boys Markets.*

Thus the *amici* mentioned above seek to have this Court repeal Norris-LaGuardia in suits for specific enforcement of no-strike provisions of collective bargaining agreements. In the words of the NAM brief,

> 'This Court should permit an employer to specifically enforce the no-strike provision in its contract with a union where the work stoppage is the result of the employees' refusal to cross a picket line set up at their employer's premises. The relief of specific performance must be obtainable even though the court makes the threshold determination that the situation does not present an issue arbitrable under the contract's arbitration provision."

NAM Br. 3. That position, as explained, represents a complete rejection of the will of Congress and the accommodation reached by this Court in *Boys Markets.* The statement of Judge Stevens in *Associated General Contr. of Ill.* v. *Illinois Conf. of Teamsters,* 454 F.2d 1324, 1328 (7th Cir. 1972) is appropriate here:

> "*Boys Markets* represents a principled accommodation between §301 of the Labor-Management Relations Act of 1947 and the 'core purpose' of Norris-LaGuardia; the decision rests on a reasoned exposition of the national labor policy. It does not support plaintiff's request for a case-by-case encroachment on the scope of Norris-LaGuardia's prohibition against labor injunctions."

B. Congress this past year expressly endorsed the "accommodation" made in *Boys Markets* between Norris-LaGuardia's prohibition of the strike injunction and the policy favoring arbitration fostered by §301(a).

On July 25, 1975, the House of Representatives passed H.R. 5900, a bill the major purpose of which was to overrule *Labor Board* v. *Denver Building Trades Council,* 341 U.S. 675 (1951), by amending §8(b)(4) of the Labor-Management Relations Act, 29 U.S.C. §158(b)(4) so as to provide that:

> Where there is a labor dispute with the general contractor or one subcontractor, lawful economic presure may be applied to halting the day-to-day operations of the general and all the subcontractors.

On October 29, 1975, the Senate Committee on Labor and Public Welfare reported out S. 1479, a companion bill designed to achieve the same purpose. S. 1479, as reported, differed from H.R. 5900, as passed by the House, in that, *inter alia,* the Senate bill but not the House bill proposed to amend the NLRA by adding a new §8(i) providing:

> "(i) Notwithstanding the provisions of this or any

other Act, any employer at a common construction site may bring an action for injunctive relief under section 301 of the Labor-Management Relations Act (29 U.S.C. 141) to enjoin any strike or picketing at a common situs in breach of a no-strike clause of a collective bargaining agreement relating to an issue which is subject to final and binding arbitration or other method of final settlement of disputes as provided in the agreement."

The plain meaning of §8(i) is that only where a strike in breach of contract "relat[es] to an issue which is subject to final and binding arbitration . . ." should federal courts be permitted to issue an injunction. The authoritative explanation of §8(i) in the Senate and Conference Reports confirms this plain meaning.

S. Rep. No. 94-438, 94th Cong. 1st Sess., p. 5 explained that:

(2) An amendment was offered by Senator Taft adding a new sub-section (i) to section 8 of the Taft-Hartley amendments to permit the Federal courts to grant injunctive relief where picketing is instituted at a common situs in breach of a "no-strike" clause of a collective bargaining agreement. This amendment would have the effect of codifying, in the industry covered by the bill, the Supreme Court's decision in *The Boys Markets, Inc.* v. *Retails Clerks Union,* 398 U.S. 235 (1970), insofar as it authorizes the District Courts to grant injunctions for strikes (or lockouts) over a grievance which both parties are contractually bound to arbitrate notwithstanding § 4 of the Norris-LaGuardia Act, as well as the limitations and preconditions on the granting of such injunctions declared in *Boys Markets.* This amendment was adopted by unanimous vote.

The Senate Report at p. 29 amplified the function of §8(i) by stating:

The purpose of this provision is to codify with respect to strikes and picketing at a common situs the accommodation established in *The Boys Markets, Inc.* v. *Retails Clerks Union,* 398 U.S. 235 (1970) between the Norris-LaGuardia Act, 29 U.S.C. 101, *et seq.* and sections 203(d) and 301 of the Labor-Management Relations Act (29 U.S.C. 141, *et seq.*). Here again, the placement of this section should not be construed to create a new unfair labor practice.

Thus where the parties to a collective bargaining agreement have provided for a method of "final adjustment" for the settlement of grievance disputes arising thereunder as to the application or interpretation of an existing collective bargaining agreement (See section 203(d)), the Courts may, notwithstanding the provisions of section 4 of the Norris-LaGuardia Act, in a suit under section 301 issue an injunction enjoining a work stoppage at a common situs. Such injunctive relief is available only where the stoppage is ["]over a grievance["] which "both parties are contractually bound to arbitrate" and provided also that the other conditions declared in *Boys Markets* are satisfied, and provided further that the procedural and equitable requirements of the Norris-LaGuardia Act are satisfied. See *Boys Markets,* 398 U.S. at 253-254 and *Emery Air Freight Corporation* v. *Local Union 295,* 449 F.2d, 586, 588-589 (2d Cir. 1971).

On the Senate floor S. 1479 was extensively debated and revised, and was eventually passed, designated as H.R. 5900 as amended. As in Committee, no opposition was voiced to this legislative codification of *Boys Markets'* accommodation of Norris-LaGuardia and §§301(a) and 203(d), and the bill as passed by the Senate included the proposed §8(i).

In conference the House accepted the inclusion of § 8(i) in H.R. 5900. See S.Conf.Rep. No 94-518, 94th Cong., 1st Sess., p. 3. The Joint Explanatory Statement of the Committee of Conference declared:

Injunctions

The Senate amendment adds a new section 8(i) which provides that "Notwithstanding the provisions of this or any other Act, any employer at a common construction site may bring an action for injunctive relief under section 301 of the Labor Management Relations Act (29 U.S.C. 141) to enjoin any strike or picketing at a common situs in breach of a no-strike clause of a collective-bargaining agreement relating to an issue which is subject to final and binding arbitration or other method of final setlement of disputes as provided in the agreement." The House bill contains no comparable provision. The House recedes. (*Id.* at p. 16.)

The Conference Report was accepted by both the House and the Senate. Again, none of the opponents of the bill spoke against the proposed § 8(i).

On December 22, 1975, President Ford announced his intention to veto H.R. 5900 (11 Weekly Compilations of Presidential Documents 1393). The crux of his veto message was:

> "I have concluded that neither the building industry nor the nation can take the risk that those who claim the bill, which proposes a permanent change in the law, will lead to loss of jobs and work hours for the construction trades, higher costs for the public, and further slowdown in a basic industry are right."
>
> * * * *
>
> "This is not the time for altering our national labor-management relations law if the experiment could lead to more chaotic conditions and a changed balance of power in the collective bargaining process."

On January 2, 1976, the President vetoed that bill (12 Weekly Compilations of Presidential Documents 16-17).

There was no criticism, express or implied, of the proposed § 8(i). Indeed, the President's stress on maintaining

the *status quo ante* as to matters which would change the parties' comparative bargaining power is in line with the purpose of § 8(i)—to codify the rule of *Boys Markets.*

Had H.R. 5900 become law, § 8(i), given the circumstances surrounding its adoption, would have amounted to Congressional affirmation of the *Boys Markets* limitations upon the power to grant strike injunctions under §301. See *United States* v. *Freeman,* 3 How. 564-565 (1845) where the Court declared:

> "[I]f it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute";

see also *Stockdale* v. *Atlantic Ins. Co.,* 20 Wall. 323, 332 (1874); cf. *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 367, 383 (1969); *Michigan Nat. Bank* v. *Michigan,* 365 U.S. 467, 481 (1961).

We submit that, despite the veto, the Congressional action constitutes "persuasive circumstances evidencing a clear design that congressional [failure to amend § 301 of Taft-Hartley or § 4 of Norris-LaGuardia] be taken as acceptance of [*Boys Markets*]." Cf. *Boys Markets,* 398 U.S., at 242. Here, the Court is confronted with the necessity for accommodating two statutes passed by two earlier Congresses which statutes appear in some respects to collide in their underlying policy presuppositions. To defer to the declared consensus of a later legislature regarding the proper accommodation is but to give due weight to the "truism that it is the business of Congress to declare policy and not this Court's".[10] *Carpenters Union* v. *Labor Board,* 357 U.S. 93, 100 (1958).

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[10] We are not suggesting that the 1975 Congress had any special insight into the intentions of the Congress that enacted either Norris-LaGuardia or Taft-Hartley which is entitled to judicial respect. *Com-*

CONCLUSION

For all the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully Submitted,

J. ALBERT WOLL
ROBERT C. MAYER
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005
LAURENCE S. GOLD
815 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorneys for AFL-CIO

GEORGE H. COHEN
ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036
BERNARD KLEIMAN
CARL FRANKEL
RUDY L. MILASICH, JR.
Five Gateway Center
Pittsburgh, Pennsylvania 15222
THOMAS P. McMAHON
1028 Liberty Bank Building
Buffalo, New York 14202
Attorneys for USWA

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pare, e.g., United States v. *Price,* 361 U.S. 304, 312 (1960); *United States* v. *United Mine Workers,* 330 U.S. 258, 282 (1947); *Waterman S.S. Corp.* v. *United States,* 381 U.S. 252, 269 (1965). Rather, we note simply that the accommodation reached in *Boys Markets* between Norris-LaGuardia and §301(a) has been applicable since 1970. In the interim period, Congress has evinced no intent to overrule that accommodation. On the contrary, the only manifestation of Congressional intent is to endorse *Boys Markets* as the proper statement of existing law.